Statement of Ray A. Campbell III
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Subcommittee on Communications

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Mr. Chairman and members of the Subcommittee, my name is Ray Campbell and I am the General Counsel of the Commonwealth of Massachusetts Information Technology Division. Thank you for the opportunity to testify on Senate Bill 761, the "Millenium Digital Commerce Act."

The Commonwealth of Massachusetts has been at the forefront of the information revolution ever since Alexander Graham Bell invented the telephone, in Boston, in 1876. Massachusetts has also been at the forefront of the Internet revolution ever since Cambridge-based BBN won the contract to build the original ARPA-Net in 1968. Since that time, Massachusetts has been fertile ground for an amazing number and variety of companies that have helped transform the Internet from an isolated defense and research network into a global communications tools that is fundamentally changing our economy and our society. In addition to the role played by our companies and universities, Massachusetts state government has also been a leader in using the Internet to deliver better, more convenient government services at less cost to the taxpayers. Governor Paul Cellucci and Lieutenant Governor Jane Swift are firm believers that we should offer citizens the option to conduct their business with the state online rather than in line.

I would like to commend Senator Abraham and the cosponsors of the Millenium Digital Commerce Act for an excellent piece of legislation, and I want to express to the Subcommittee my whole-hearted support for this bill. Over the past several years, many attempts have been made at the state and federal levels to introduce legislation to promote the growth of electronic commerce. In my opinion, many of these attempts have been based on mistaken assumptions about the nature of the information economy and government's role in encouraging its development. I believe Senate Bill 761 avoids all of these pitfalls, and its enactment will make a meaningful contribution towards a consistent, predictable, minimalist framework for interstate electronic commerce.

I would like to confine the balance of my testimony to two topics. First, I would like to articulate a set of general principles that I believe should guide government efforts to make public policy for the Information Age. Second, I would like to highlight the key aspects of the Millenium Digital Commerce Act that are, in my opinion, perfectly consonant with these principles.

While adherence to principle is essential in any policy-making endeavor, it is particularly important when crafting electronic commerce legislation because we are operating in an arena generally devoid of empirical guideposts. Electronic commerce is such a recent development

that there is no reservoir of experience on which to draw as we consider the likely consequences of government action. Recognition of, and reliance on, first principles is crucial in such an environment. As such, I would offer the following four principles to guide policy making for the Information Economy.

First, policy makers must recognize the unique characteristics of the Internet. The industrial revolution, and hence industrial-era economic policy, was characterized by stability, standardization, hierarchy, and centralization. The Internet, on the other hand, is a highly decentralized and complex adaptive system, and is almost organic in its ability to self organize and respond to changes in its environment. Given this, we should be extremely suspicious of the notion that traditional legislative and regulatory mechanisms can shape the Internet or electronic commerce in predictable ways.

Indeed, there is a widespread appreciation that a lack of government regulation has been one of the key factors behind the phenomenal growth of the Internet. Congress itself, in the Telecommunications Act of 1996, stated that "the Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation" and further declared that "it is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."

The second principle I would offer is that government action to promote electronic commerce will be most effective when it is narrowly tailored to address specific, actual market failures or legal impediments. Too much state and federal electronic commerce legislation has been motivated by the mistaken belief that policy makers can divine where the markets and technology will be a few years in the future, and that we can hasten that future or steal a march on our competitors by creating a legal infrastructure to support that specific vision. I believe such attempts are doomed to failure, both because they rely on linear extrapolations of current technologies and business models, and because they rely on the assumption that laws create markets.

In fact, the future course of electronic commerce is being charted this very minute by someone none of us has ever heard of, working in a small office paid for with a second mortgage, on the outskirts of Route 128, Silicon Valley, or Buffalo, Wyoming. The explosive growth of the Internet and electronic commerce is convincing proof that these visionary men and women are not waiting for lawyers and legislators to pave the road to the future for them. In truth, the law has always been more effective at codifying and ratifying established business practices than it has been at creating such practices out of whole cloth. Any such attempt to regulate the future into existence will surely be counterproductive. If advocates of this approach are successful, the future of electronic commerce will not be a Field of Dreams – where if we build it, they will come – but rather a Field of Nightmares – where because they built it, we have come – to regulate, to prescribe, and to tax.

The third principle for successful electronic commerce legislation is that, to the greatest extent possible, it should leverage existing sources of state law to promote a more flexible and

stable legal basis for electronic commerce. While the advent of electronic commerce changes many things, it does not change everything. Massachusetts is home to the oldest judicial system in this hemisphere, and over the centuries our courts and the courts in other jurisdictions have established a solid foundation of precedent that lends tremendous stability and predictability to the legal relations between parties. This is particularly true in such established areas as the law of signatures and the law of contract formation and defenses. Wholesale changes in these bodies of law will introduce unnecessary complications and untested concepts, leading to confusion and litigation. Further, the common law is more flexible and responsive to changing circumstances, including changing technologies, than is prescriptive legislation.

Finally, the fourth principle for electronic commerce policy making is that government actions should preserve and promote a competitive marketplace where private actors are free to choose the technologies and business models that best satisfy their unique cost/benefit and risk requirements. The use of contracts between private parties is ideally suited to the unique characteristics of the Internet. As noted previously, the Internet is a highly decentralized medium. Any legislation that seeks to restrain, rather than harness, the ability of private parties to order their own relations is swimming against the tide of the Internet revolution. The Internet promises to give rise to vastly more efficient and transparent markets, in which market participants can evaluate for themselves the specific technologies and business models that best suit their needs.

Having summarized what I believe are the core principles that should guide government policy making in the electronic commerce sphere, I would like to point out some of the key ways in which the Millenium Digital Commerce Act is fully supportive of the principles.

First, the proposed bill broadly validates the use of electronic records and signatures in interstate commercial transactions, but does not attempt to address the use of such methods in other types of transactions where such a rule would be more problematic. Second, the bill does not favor any particular technology or business model by granting special presumptions or evidentiary privileges. Third, the bill acknowledges the freedom of parties to establish by contract the technologies and methods they can use to create legally binding records and signatures. Fourth, the proposed bill preserves and leverages the existing law of signatures and contracts. And, finally, the bill only preempts state law on an interim basis until such time as uniform state law addressing electronic commerce is in place.

Based on the foregoing, I am of the opinion that the Millenium Digital Commerce Act is a timely and appropriate piece of legislation. If takes cognizance of the unique characteristics of the Internet, it is narrowly tailored to address specific legal barriers, it leverages existing sources of law in a way that promotes stability and certainty, and it preserves freedom of choice for market participants. As a policy maker with a state at the forefront of the Internet revolution, I strongly encourage this Subcommittee to act favorably on this bill.

I thank the Chairman and the members of the Subcommittee for the opportunity to testify today on this important issue. If there is anything I can do in the future to be of assistance as you weigh these crucial matters, please feel free to call on me. Thank you.